

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAROL W. HOLBROOK,

Defendant-Appellant.

UNPUBLISHED

April 5, 2002

No. 228693

Wayne Circuit Court

LC No. 99-004679

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of assault with intent to commit murder, MCL 750.83, and assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). Defendant was sentenced to fifty to one hundred years' imprisonment for the assault with intent to commit murder conviction and 80 to 120 months' imprisonment for the assault with intent to commit criminal sexual conduct involving penetration conviction.¹ Those sentences were subsequently vacated, and defendant was sentenced, as a third habitual offender, MCL 769.11, to 100 to 180 years' imprisonment for the assault with the intent to commit murder conviction and 160 to 240 months' imprisonment for the assault with intent to commit criminal sexual conduct involving penetration conviction. We affirm defendant's convictions; however, we vacate the sentences and remand for resentencing.

I. Sentencing claims

Defendant first argues that the trial court erred in imposing sentences that far exceeded the sentencing guidelines range, and in failing to correct obvious scoring errors. The instant offenses were committed on April 1, 1999, making them subject to the statutory sentencing guidelines. MCL 769.34(2). Those guidelines require a court to impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may depart from the sentencing guidelines only if there is a substantial and compelling reason for the departure. MCL 769.34(3); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A court

¹ Defendant was also charged with unarmed robbery, MCL 750.530, but was found not guilty of that offense.

must state on the record the rationale for departure. MCL 769.34(3); *Armstrong, supra*. We review for an abuse of discretion a trial court's determination that objective and verifiable factors constitute substantial and compelling reasons for departure from the guidelines' recommended sentence. *Armstrong, supra* at 424, citing *People v Fields*, 448 Mich 58, 69-70; 528 NW2d 176 (1995), and *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). Moreover, this Court reviews issues of scoring of the guidelines to determine whether the evidence supported the scoring. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

In the present case, the record indicates that the factors the trial court considered most relevant to defendant's sentencing were defendant's prior criminal record, the circumstances of the crimes at issue in this case, and the belief that the guidelines failed to adequately account for defendant's record and the severity of the crimes.² However, the court did not indicate what it considered to be a "substantial and compelling" reason for departure from the sentencing guidelines range. Moreover, the court stated: "I don't think guidelines even apply in a case like this." Thus, it is not clear from the record whether the court intended to depart from the guidelines range or chose to wholly disregard the guidelines. Due to the lack of clarity in the record, we vacate defendant's sentences and remand this case to the trial court for resentencing in accordance with MCL 769.34.

For the purposes of the remand, we clarify that the statutory sentencing guidelines apply to these offenses, which were committed after January 1, 1999. MCL 769.34. Thus, if the trial court departs from the guidelines range, it must state on the record its substantial and compelling reason or reasons for such departure. MCL 769.34(3).³ Insofar as the court relies on one or more factors for departure that were already taken into account in determining the guidelines range (*e.g.* defendant's prior record or certain circumstances of the present crimes), the court must make findings that, as applied to this case, such a factor or factors were given inadequate weight in the scoring of the guidelines. MCL 769.34(3)(b).⁴

Because the scoring of the sentencing guidelines is relevant to the issue on remand, we consider defendant's additional argument that the trial court erred in failing to adequately respond to challenges to the scoring of offense variables. Defendant claims that it was error to

² Although the court noted on its departure evaluation "[Defendant] also faces rape and kidnap charges in Monroe County," the court stated at the sentencing hearing that its decision was not influenced by other charges: "I don't want anybody to infer that I'm sentencing him on a case that he has not been convicted on. I'm not even considering that. So, if anyone reads the report and thinks that I did, I will say positively, I am not considering that. I am considering the facts in this case, and the cases that happened before that."

³ It is unclear from the court's comments at the sentencing hearing whether the sentences were imposed as the result of the court's belief that the sentencing guidelines constitute poor public policy. We note that such a belief is not a substantial and compelling reason for departure, *Hegwood, supra* at 440, and we caution the court accordingly.

⁴ Defendant seeks resentencing before a different judge. However, the court's error appears to be a function of its incorrect understanding of the new sentencing structure, versus any prejudices or improper attitudes regarding defendant. Therefore, we see no reason to require that defendant be resentenced by a different judge. See *Hegwood, supra* at 440 n 17.

have assessed defendant with ten points for aggravated use of a weapon because the evidence suggested he only used his hands. Defendant also claims that the scoring of fifteen points for predatory conduct was inaccurate.

An assailant's bare hands may constitute a weapon if the assault statute at issue does not require that the actor perpetrate the assault with a dangerous weapon. *People v Van Diver*, 80 Mich App 352, 354-355; 263 NW2d 370 (1977). Here, neither of the crimes of which defendant was convicted required use of a deadly weapon. MCL 750.83; MCL 750.520g(1). Thus, there was no error in scoring the offense variables to reflect use of a weapon.

Moreover, the scoring of fifteen points for predatory conduct was permissible. Predatory conduct is defined in the sentencing guidelines as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(1)(a). In the present case, the evidence suggested that defendant pretended to be a homebuyer. He conversed with the victim for approximately fifteen minutes about buying a home. During that time, the victim mentioned that she was seven months pregnant. Defendant asked about various selections that were offered in the homes, and when the victim directed defendant into the selection room, she was violently assaulted by defendant. Thus, the evidence supported the determination that defendant's preoffense conduct consisted of gaining the victim's trust for the purpose of victimization. Under these circumstances we find no error in the scoring of the sentencing guidelines or in the court's responses to the scoring challenges.

II. Judicial misconduct claim

Defendant next argues that the trial court committed judicial misconduct by making unfavorable remarks to defense counsel, and by not requesting the prosecution to give a closing argument. Defendant failed to preserve this issue for our review by objecting to the trial court's conduct in the lower court. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Therefore, our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant challenges the trial judge's statement that defense counsel was "beating a dead horse" in regard to cross-examination of a forensic scientist who testified about conclusions drawn on DNA evidence. That comment did not amount to plain error. Expressions of annoyance or impatience are not enough to establish bias and impartiality. *In re Hocking*, 451 Mich 1, 13 n 16; 546 NW2d 234 (1996), citing *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994). The court's comment in this case did not have the effect of stopping defense counsel's cross-examination of the witness. In fact, the court instructed defense counsel to "Go on," and defense counsel continued with its questioning on the subject. Moreover, our examination of the record reveals that the trial court did not repeatedly make remarks or excessively interfere with the examination of the witness during this bench trial.

Defendant further challenges the trial court's statement during defense counsel's closing argument that counsel was insulting the court's common sense and that the court was not going to pay attention to the argument that the DNA evidence pointed to an Hispanic assailant. The court's comments in this regard do not constitute plain error. Additionally, because this was a bench trial, not a jury trial, the court's comments did not cause prejudice to defendant.

Defendant's claim that the trial court erred in failing to request that the prosecution to give a closing argument also lacks merit. A party is not required to give a closing argument. MCR 2.507(E). Thus, no plain error occurred. Overall, the record does not indicate that the trial judge predetermined the case or lacked impartiality.

III. Claims regarding the identification of defendant

Defendant next argues that he was denied a fair trial because identification evidence was produced based on a photographic display rather than a corporeal lineup. This issue was not preserved for our review because defendant failed to object at trial to the admission of the photographic display identification or the witness' in-court identification of defendant and did not request a *Wade*⁵ hearing. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). Therefore, our review is for plain error that affected defendant's substantial rights. *Carines, supra*.

A photographic display is a proper means of identification when a defendant is not in custody. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973). The photographic display in the instant case was conducted on April 21, 1999. Defendant was not in custody at that time. Defendant's picture was placed in the display based on a tip received by the police. At the time the photographic display was conducted, defendant was one of several suspects. The victim was given a set of pictures in both black and white and in color. The victim was able to identify defendant for certain as her attacker. We conclude that there is not evidence in the record indicating that the photographic display was impermissibly suggestive. Under these circumstances, where defendant was not in custody at the time of the display, and there is nothing highly suggestive about the display, identification of defendant through use of the photographic display was not plain error.⁶

⁵ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

⁶ Even if the identification procedure was unduly suggestive, there was an independent basis to admit the victim's in-court identification of defendant as her attacker. *People v Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000). In determining whether an independent basis exists for the admission of an in-court identification, a court should consider

- (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant (6) any prelineup identification of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*Davis, supra* at 702-703.]

In the present case, the victim had the opportunity to view defendant in the daylight. The victim spoke to defendant for approximately fifteen minutes face to face. The victim saw defendant's face during the assault, which did not end until approximately forty minutes after he arrived at
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IV. Ineffective assistance of counsel claim

Defendant further argues that his trial counsel rendered ineffective assistance. Defendant did not move for a new trial or evidentiary hearing before the trial court. Therefore, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). “To establish a claim of ineffective assistance of counsel, the defendant must show that counsel’s performance was deficient and that there is a reasonable probability that, but for the deficiency, the fact finder would not have convicted the defendant.” *Snider, supra* at 423-424, citing *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). The deficiency must have prejudiced the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.* We will not substitute our judgment for that of defense counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant first claims that defense counsel failed to properly investigate defendant’s alibi. Defendant testified that he went to two banks at approximately 4:00 p.m. on the day of the incident. There is no indication that there were witnesses who could verify defendant’s account, which defense counsel chose not to call. On appeal, defendant has not named any alibi witnesses or provided any additional detail regarding his alleged alibi. Consequently, the record is devoid of deficient performance or prejudice to defendant in regard to any alibi or alibi witnesses. *People v Leonard*, 224 Mich App 569, 593; 569 NW2d 663 (1997).

Defendant next claims that defense counsel failed to gain in-depth knowledge of the DNA evidence. Defense counsel’s strategy in cross-examining the forensic scientist was to suggest that it was more likely the person whose DNA matched the DNA found at the crime scene was of Hispanic origin. Apparently, defense counsel chose not to employ an expert at the county’s expense as the court had allowed. Defense counsel showed an understanding of the DNA evidence during examination of the forensic witness and the fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). Given that defendant’s alleged alibi was presented at trial and the DNA evidence was challenged at trial, we reject defendant’s request to remand the case for an evidentiary hearing on these issues.

V. Sufficiency of the evidence claim

Last, defendant argues that the prosecution failed to present sufficient evidence to support his convictions.⁷ This Court reviews sufficiency claims by considering the evidence in the light

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the model home. From the victim’s description of her assailant, the police received a tip leading them to defendant. Defendant’s DNA matched the DNA that was found at the scene of the assault. Therefore, even if the photographic display was unduly suggestive, there was an independent basis to admit the in-court identification at trial, and no error occurred.

⁷ While defendant also suggests in his statement of questions involved that the verdict was against the great weight of the evidence, we refuse to consider that claim. Defendant did not
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most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v DeKorte*, 233 Mich App 564, 567; 593 NW2d 203 (1999).

The offense of assault with intent to commit murder requires (1) an assault (2) with an actual intent to kill (3) which, if successful, would make the killing murder. MCL 750.83; *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Here, the victim testified that defendant, while pretending to be a customer interested in buying a home, followed her into the selection room, grabbed her, spun her around, tried to put her in a headlock and snap her neck. The victim further testified that defendant straddled her on the floor, pulled her head up and tried to “whack” it down of the cement floor. According to the victim, defendant punched her twice in the face and made a triangle shape with his thumbs and fingers and put his hands around her throat. Defendant choked the victim into unconsciousness. Officer Kraus testified that when he arrived, the victim was in fetal position, there was blood on her body, her neck was bruised and her breasts were exposed. Thus, sufficient evidence was presented to find defendant guilty of assault with the intent to commit murder.

Assault with intent to commit criminal sexual conduct involving sexual penetration requires proof of (1) an assault; (2) for a sexual purpose; (3) with the intended sexual act involving some actual entry of another person’s genital or anal openings or some oral sexual act; and (4) aggravating circumstances, *e.g.* the use of force or coercion. MCL 750.520g(1); *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). Here the victim testified that after being pinned to the ground, defendant attempted to force his penis into her mouth. Defendant then proceeded to pull up the victim’s shirt, lift up her bra, and fondle her chest while he masturbated. Officer Kraus’ testimony regarding the victim’s condition corroborated the victim’s account. The forensic scientist testified that a sample board taken from the crime scene contained a semen stain that matched defendant’s DNA. The evidence suggested that there was only one chance in 4.79 billion that a Caucasian individual other than defendant would have the same DNA makeup. Under these circumstances, the prosecution presented sufficient evidence to support defendant’s conviction for assault with the intent to commit criminal sexual conduct involving penetration.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

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present a challenge based on the great weight of the evidence by bringing a motion for new trial below. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Moreover, defendant does not argue the merits of this issue. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Leonard, supra* at 588.